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CIVIL DOCKET

UNITED STATES DISTRICT COURT

C-69 470 RHS

JOSEPH PARISI

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON, et al.

Basis of Action: Petition for Writ of Habeas Corpus & Temporary Restraining Order.

PROCEEDINGS

1969:

Nov. 28 -

1. Filed Petition for Writ of Habeas Corpus.
2. Filed Affidavit of Joseph Parisi.
3. Filed Affidavit of Richard L. Goff.
4. Filed Memorandum of Points & Authorities.
5. Filed Supplemental Memorandum of Points & Authorities.
6. Filed ORD re prelim. inj.

Dec. 10 -

7. Filed notice of appeal by plaintiff.

Dec. 12 -

Mailed Clerk's notice of filing appeal.

8. Filed cert copy of ord from USCA, 9th Cir, denying mo staying petnrs deployment, on condition that resps produce appellant in this district if appeal results in his favor.

Dec. 19 -

9. Filed letter from attorney Douglas M. Schwab stating that Reporter's Transcript will not be necessary for the appeal.

1970:

Jan. 7 -

10. Filed certified copy of Order of CCA re: Expedited Appeal.

Jan. 12 -

Made, Mailed Record on Appeal CCA

Jan. 14 -

11. Filed receipt of record on appeal, CCA #25133.

Mar. 6 -

12. Filed OSC, ret. 3-24-70.

13. Filed affidavit of Richard L. Goff.

Mar. 9 -

14. Filed petnrs affidavit of svc by mail of OSC.

Mar. 19 -

ORD hrg on OSC contd to 3-26-70 in Oakland. (Burke)

Mar. 20 -

15. Filed resps mo for stay of proceedings pending petnr's exhaustion of his available military judicial remedies.

Mar. 25 -

16. Filed petnr's Reply Brief.

17. Filed affidavit of petnr.

Mar. 27 -

18. Filed letter from USCA, 9th Cir, returning file to USDC.

Mar. 31 -

19. Filed Order staying proceedings and Certifying for Interlocutory Appeal. (Burke)

Apr. 3 -

Copy of Order mailed to Attorneys of record.

Apr. 20 -

20. Filed certified true copy of Judgment of 9th circuit ct. that the appeal is dismissed, as moot. (Hamley)

Apr. 27 -

21. Filed receipt of Wm B. Luck, Clerk, Apr. 24, 1970 on ord. #25773. The court DENIES petitioner-appellant's [sic] mo to treat his application & his reply brief in the district court as his opening brief in this court. (Ely)

Dec. 22 -

Case ORD reassigned to Judge Schnacke.

1971:

Jan. 15 -

22. Filed cpy CCA ord. affirming USDC decision.

RICHARD L. GOFF
DOUGLAS M. SCHWAB
44 Montgomery Street, Suite 3000
San Francisco, California 94104
Telephone: 981-5000
Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B. Davidson, Etc., et al.,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS AND FOR TEMPORARY RESTRAINING ORDER

Comes now Petitioner, Joseph Parisi, and petitions this Court for a Writ of Habeas Corpus and Temporary Restraining Order:

FIRST CAUSE OF ACTION

I

Petitioner is a member of the Armed Forces of the United States, having been inducted into the United States Army.

II

Petitioner is presently in the custody of respondents at the United States Army Training Center, Fort Ord, California, and by such custody is thereby restrained and deprived of his liberty. For the past several months, Petitioner's assigned duties at Fort Ord have been to work in the hospital.

III

The custodians immediately charged with the control and custody of Petitioner are presently Major General Phillip Davidson, Commanding General, United States Army Training Center, Fort Ord, California, and Captain Coughlin, Commanding Officer, Hospital Company, United States Army Training Center, Fort Ord, California. They act on behalf of the United States Army.

IV

Pursuant to Department of Defense Directive (D. O. D.) 1300.6 (effective May 10, 1968), Petitioner has filed, with the appropriate Army officials, an Application for Discharge from the Army on the ground that, since entering the Army, he has become, by reason of his religious training and belief, opposed to participation in war in any form, and, therefore, entitled to discharge from the United States Army by reason of such beliefs.

V

Said Application, a copy of which has been attached hereto as Exhibits A & B and which is incorporated herein by reference, has been processed in accordance with Army and Department of Defense regulations. Pursuant to Army Regulation 635-20 (AR 635-20), Petitioner was interviewed by a psychiatrist, a chaplain and by an officer with the rank of Captain (0-3). Copies of

the reports of said interviews are attached hereto and marked as Exhibits C, D, and E. Said reports, without exception, recognize Petitioner's sincerity concerning his conscientious objection. The chaplain's report concludes that religious training and religious commitment provide the foundation for his present conscientious objection. Also attached to this Petition, as Exhibit F, is a copy of a report by Petitioner's Commanding Officer, recommending disapproval of Petitioner's Application. Said report was not based on an interview with Petitioner.

Following the above-mentioned interviews, Petitioner's Application was forwarded to Army officials in Washington, D.C. Said officials, without any basis in fact, rejected said Application. Attached hereto and marked as Exhibit H

is a written communication from the Adjutant General's Office to Petitioner purporting to summarize an oral conversation with Army Officials in Washington, D.C. in which said officials gave their reasons for rejecting Petitioner's Application.

VI

Following denial for his Application for Discharge by Army officials in Washington, D.C., Petitioner received orders to report on December 1, 1969, for weapons training preparatory to being transferred for duty to Viet Nam. Also following said denial, Petitioner received instructions that he is to comply with his original assignment orders, calling for duty in Viet Nam. Respondents threaten to, and unless restrained by this Court will, transfer Petitioner to and force him to perform such duties. Such duties will seriously

conflict with Petitioner's conscientiously held religious beliefs. Furthermore, in the event Petitioner is forced to carry out the above orders, and report for duty as above alleged, Petitioner may be without the jurisdiction of this court and may be thereby deprived of his immediate right to discharge should his Petition be granted by this court.

VII

There is no basis in fact for denial of Petitioner's Application for discharge on the ground that his convictions were held prior to entry into the Armed Forces. There is absolutely no evidence of this in the file; indeed, the only evidence in the file on this point is to the contrary. Furthermore, when both the hearing officer and the chaplain affirmed Petitioner's sincerity and where both affirmed the fact that because of religious training and belief, Petitioner is opposed to war in

any form, to deny Petitioner discharge on the ground that he held these beliefs prior to entry into the Military Service (while at the same time granting discharge to one who came to hold the identical beliefs after entry into the Military Service) would be arbitrary and unreasonable and would deny Petitioner his right to equal protection under the law.

Nor is there any basis in fact for denial of this Application for any of the other reasons set forth in the written communication attached hereto and marked as Exhibit H. This is particularly true where it is unquestioned by everyone who has interviewed Petitioner that he is sincere and that his convictions are based on religious training and belief.

Since there is no basis in fact for the denial of this Application for Discharge, it is likely that Petitioner will prevail in this Court in his Application

for a Writ of Habeas Corpus.

VIII

No irreparable harm will result to Respondents if this Court restrains and enjoins them from requiring Petitioner to comply with orders for weapons training and for transfer out of this Court's jurisdiction.

SECOND CAUSE OF ACTION

I

Petitioner incorporates herein by reference all the allegations set forth in Paragraphs I through VIII, inclusive.

II

Following denial of his Application for Discharge by Army officials in Washington, D.C., Petitioner applied to the Army Board of Correction of Military Records (A. B. C. M. R.) for review of said denial. The A. B. C. M. R. has not yet acted on Petitioner's request.

III

Under Department of Defense Directive 1300.6 at Section VI (B)(2), pending decision upon an Application for Discharge on the basis of conscientious objection, "The person will be employed in duties which involve the minimum conflict with his asserted beliefs." AR 635-20 provides even stronger support for this proposition. It states: "6. Assignment. a. Except as indicated in b below, an individual who applies for discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum practicable conflict with his asserted beliefs pending a final decision on his application."

IV

Notwithstanding such regulations, Petitioner has received from Respondents the orders referred to in Paragraph VI of the First Cause of Action. Said

orders, and the duties which they require, seriously conflict with Petitioner's conscientiously held religious beliefs and to more than the minimum extent permitted under the above cited regulation.

V

In the event the Petitioner is forced to carry out the orders referred to in Paragraph VI of the First Cause of Action, and report for duty as above alleged, Petitioner will be without the jurisdiction of this Court and will be deprived of effective access to judicial relief if his pending Application is denied by the A. B. C. M. R.

WHEREFORE, Petitioner prays as follows:

1. That the Court grant his Petition for Writ of Habeas Corpus and order Respondents to release him from their custody and discharge him from

the Army;

2. That the Court enjoin Respondents from requiring Petitioner to perform the orders referred to above and further enjoin Respondents from transferring Petitioner outside this Court's jurisdiction, and that the Court enter a temporary order restraining Respondents from requiring Petitioner to perform the orders referred to above and further restraining Respondents from transferring Petitioner outside this Court's jurisdiction, and that the Court order Respondents to show cause why a Writ of Habeas Corpus should not be granted, and why a preliminary injunction should not be issued;

3. For such other and further relief as the Court shall deem just and proper.

Dated: November 24, 1979.

/s/ Richard L. Goff
/s/ Douglas M. Schwab
Attorneys for Petitioner

RICHARD L. GOFF
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44 Montgomery Street, Suite 3000
San Francisco, California 94104
Telephone: 981-5000
Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B. Davidson, Commanding General, United States Army Training Center, Fort Ord, California; Captain Coughlin, Commanding Officer, Hospital Company, United States Army Training Center, Ford Ord, California; and Stanley Resor, Secretary of the Army,

Respondents.

AFFIDAVIT OF JOSEPH PARISI, IN SUPPORT OF PETITION FOR HABEAS CORPUS.

STATE OF CALIFORNIA)
) ss.
COUNTY OF MONTEREY)

JOSEPH PARISI, being duly sworn, deposes and says:

1. I am the petitioner herein. All facts hereinafter stated are true within my own personal knowledge.

2. I have read Exhibits "A", "B", "C", "D", "E", "F", "G", "H" and "I" to the petition for Habeas Corpus filed in the above entitled action. Said Exhibits "A" and "B" constitute a true and complete copy of my application for discharge from the United States Army as a conscientious objector pursuant to Department of Defense Directive 1300.6 and Army Regulation 635-20. Exhibit "A" fully and thoroughly sets forth the nature of my religious beliefs and my opposition to participation in war in

any form which is based upon such beliefs. Exhibit "B" is a group of letters, attesting to my beliefs, from people who have known me. Exhibits "C" and "D", respectively are true and correct copies of the favorable endorsements to my application by the psychiatrist and Chaplain at Fort Ord, as a result of my required interviews with them.

3. Exhibit "E" is a true and correct copy of the findings and decision - recommending approval - of Captain Ronald A. Zanoni, the hearing officer, as a result of my hearing before him concerning my application pursuant to the regulations. Attached to Exhibit "E" is a copy of a letter of August 25, 1969 from me to my congressman concerning my application.

4. Exhibit "F" is a copy of the recommendation concerning my application by Captain George E. Hubman, my immediate commanding officer in the Hospital Company. Captain Hubman did not at any time interview me concerning my application or my conscientious objector beliefs. I never had any conversations with Captain Hubman about my religious convictions and my beliefs in respect to war and military service. The only conversations which I ever had with Captain Hubman concerning my application for discharge as a conscientious objector were on two occasions when I asked Captain Hubman why the application was not being processed and why orders had been issued and were outstanding for me to be transferred to Viet Nam while my application was pending, and he replied that the matter

would be taken care of.

5. Before my application and other related papers were forwarded to the Department of the Army in Washington D.C. the Adjutant General at Fort Ord, acting for the Commanding General at Fort Ord, placed a notation in the file recommending that my application be approved.

6. Exhibit "G" is a copy of a telegram from the Department of the Army in Washington to the Fort Ord Army Base, dated November 1, 1969 stating that my application had been disapproved; and Exhibit "H" is a communication from the Adjutant General at Ford Ord to the Hospital Company to which I am assigned, purporting to summarize a verbal communication with the Department of Army in Washington as to the

reasons for disapproval of my application. I did not receive either of the foregoing documents or learn of the disapproval until Monday, November 17, 1969. I have not yet received from the Department of the Army a written explanation of why my application was denied.

7. On November 24, 1969, I submitted to the Army Board for Correction of Military Records an application for its review and correction of the Army's denial of my application for discharge as a conscientious objector. I have notified my immediate commanding officer, at Fort Ord, of my filing of this petition. A copy of this petition is attached as Exhibit "I" to the petition for habeas corpus herein.

8. At my hearing on October 6, 1969 before the Hearing Officer, Captain Zanoni, I was questioned extensively by Captain Zanoni about the source and development of my beliefs as a conscientious objector and when those beliefs arose and became fixed. I was specifically asked whether I did not have these convictions before I entered in the service and, if not, what my beliefs were at the time I entered in the service. I replied that at the time I entered the service I did have certain feelings or leanings toward non-violence; that these were uncertain and unclear in my mind; and that I was not then opposed to all military service or activity and believed that in the military I would be able to be in a position where I could help and assist others. I further stated that it was

only after the experience of combat training in basic training, coupled with intensive Bible reading and discussion of my religious beliefs, that I realized that I was totally opposed on religious grounds to any form of war or military service. The hearing officer also questioned me about whether I was opposed to all military service or only the direct participation of direct combat activity. I stated that since joining the army I had come to realize that any form of military service (including the psychological social work in which I was engaged at Fort Ord) was a form of support of the military and the organized violence inherent in the military; and that I was conscientiously opposed to giving such support.

9. The report of the Chaplain (Exhibit "D") refers to my "acknowledgement of conceivable situations where force with a 'benevolent intent' is necessary, and therefore, justified". This refers to my statements, both in my application and in my interview with the Chaplain, that I believed I might use force in idividual situations to restrain an individual from harming himself or harming someone else, but that such force would be the minimum restraint necessary. However, I have at all times stated, both in my application and in my interview with the Chaplain and other interviews, that I did not and could not believe in the use of organized military force for any purpose.

10. I was drafted on August 22, 1968. After going through basic training,

I was and still am assigned to the Mental Hygiene Consultation Division of the Hospital Company at Fort Ord to serve as a psychological social worker, interviewing and giving assistance to military personnel with psychiatric or psychological problems. However, in June 1968, shortly after my application for discharge as a conscientious objector had been submitted, I was advised by one of my superiors in the Hospital Company that I had been placed on a "levy", i.e., a list of persons, for assignment to Viet Nam. Although I protested that such an assignment pending my application for discharge as a conscientious objector was contrary to the Army regulations, on August 8, 1969 special orders were issued (see Exhibit "A" to this affidavit) which would have required

me to undertake training for and then to be transferred to service in Viet Nam. Subsequently, on August 22, 1969, however, these orders were revoked (see Exhibit "B" hereto).

11. However, on Tuesday, November 18, 1969 I received a telephone call from the Personnel Action Division of the Hospital Company, advising me that new orders have been issued assigning me for service in Viet Nam. I was told to report to the Personnel Office. I reported to the Personnel Office on November 20, 1969 and was told by Specialist Thomi that the orders transfering me to Viet Nam are being typed up, and that commencing Monday, December 1, 1969, I am to undergo "RVN" training in preparation for such service in Viet Nam.

12. The "RVN" training would require me to participate in target

practice with rifles and machine guns, and field training in simulated combat situations. The Viet Nam service would involve psychological social work in the field, could require at any time my direct participation in combat and carrying of weapons, and at all times would involve direct participation in supporting of combat activities in Viet Nam and helping to prepare soldiers for battle.

13. The training activities and Viet Nam service described above would be in direct and serious conflict with my religious convictions of conscientious objector. If I am forced to perform them I would be forced to directly violate my own religious beliefs.

14. I am willing to continue performance of my psychological social work at the Mental Hygiene Consultation

Division at Fort Ord, pending resolution of my request for discharge as conscientious objector. I consider this job in minimum conflict with my beliefs as a conscientious objector.

I feel that the orders for RVN training and for service in Viet Nam require duties which are in far greater conflict with my religious beliefs and which, because of such beliefs, I could not perform.

DATED: November 25, 1969

/s/ Joseph Parisi

Subscribed and sworn to before me this 25th day of November, 1969.

/s/ Herbert A. Schwartz
Notary Public in and for
the County of Monterey
State of California
My Commission
Expires: January 29, 1972

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B. Davidson, Etc., et al.,

Respondents.

ORDER RE PRELIMINARY INJUNCTION

The court has considered petitioner's verified petition for habeas corpus and supporting affidavits and points and authorities and the oral arguments of counsel -- Richard L. Goff and Douglas Schwab appearing for petitioner, and Steven Kazan for Respondents, and the court has held a hearing on petitioner's application for preliminary injunction; and good

cause appearing therefor, the Court makes the following order:

Pending the decision on Petitioner's Application for Discharge from the Army as a conscientious objector, by the Army Board for Correction of Military Records, and the further order of this Court, each of the above named respondents is hereby restrained from assigning the petitioner, Joseph Parisi, to any duties which require materially greater participation in combat activities or combat training than is required in his present duties.

It is further ordered that this court shall retain jurisdiction of this case until decision on petitioner's application by the Army Board for Correction of Military Records.

Petitioner's application for preliminary injunction against transferring petitioner out of the Northern

District of California is denied.

Dated: November 28, 1969

/s/ Lloyd H. Burke
United States District
Judge

The requisite service of process may be made by a private citizen as well as by a United States Marshal.

Dated: November 28, 1969

/s/ Lloyd H. Burke
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Civil No. 25133

Joseph Parisi,

Petitioner and Appellant,

vs.

Major General Phillip B. Davidson, etc., et al.

Respondents and Appellees.

ORDER

Before CARTER and WRIGHT, Circuit Judges.

Appellant moves for an order staying his deployment by the military outside of the jurisdiction of the United States District Court for the Northern District of California pending a ruling on his appeal.

ORDERED, that the motion is denied on condition that Respondents

produce the Appellant in this district if the appeal results in his favor.

/s/ James M. Carter

/s/ Eugene A. Wright

United States Circuit Judges

SUPREME COURT OF THE UNITED STATES

October Term, 1969

Joseph Parisi,

Petitioner,

v.

Major General Phillip B. Davidson, etc., et al.

APPLICATION FOR A STAY

[December 29, 1969]

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant claims he is a conscientious objector entitled to classification as such. The Army did not approve that classification and his appeal is now pending before the Army Board for Correction of Military Records.

Meanwhile he applied to the District Court for the Northern District of California for a writ of habeas corpus, and for an order restraining respondents

from transferring him out of the Northern District of California. The District Court denied that relief but it did restrain respondents from assigning applicant "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties." The District Court retained jurisdiction of the case.

Applicant appealed to the Court of Appeals and asked for an order staying his deployment pending disposition of his appeal. That court denied his motion for a stay "on condition that respondents produce the appellant in this district if the appeal results in his favor." He now seeks a stay from me, as Circuit Justice; and he represents that he is under orders to report for deployment to Vietnam day after

tomorrow, December 31, 1969.

Applicant is at present assigned to duties of "psychological counseling". It would seem offhand that "psychological counseling" in Vietnam would be no different than "psychological counseling" in army posts here. He would, of course, be closer to the combat zones than he is at home; and he says that he could end up carrying combat weapons.

I heretofore granted like stays in cases involving deployment of alleged conscientious objectors to Vietnam. See Quinn v. Laird, 89 S. Ct. 1491. But this case is different because of the protective orders issued by the District Court and the assurance given the Court of Appeals that the applicant will be delivered in the Northern District if he wins his habeas corpus case. Moreover, as the Solicitor General points out, the Secretary of the Army is a party to this action; hence the

case will not become moot by the deployment.

If it were clear that applicant would win on the merits, a further protective order at this time would be appropriate. But the merits are in the hands of a competent tribunal as yet unresolved. And I cannot assume that the Army will risk contempt by flouting the protective order of the District Court.

Application denied.

RICHARD L. GOFF
DOUGLAS M. SCHWAB
44 Montgomery Street, Suite 3000
San Francisco, California 94104
Telephone: 981-5000

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-69 470 LHB

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON, etc., et al.

Respondents.

AFFIDAVIT OF RICHARD L. GOFF

On March 5, 1970, I received a copy of a letter addressed to Petitioner, a copy of which is attached hereto as Exhibit A, informing Petitioner that the Army Board for Correction of Military Records denied his application

for relief.

/s/ Richard L. Goff

Subscribed and sworn to
before me this 5th day of
March, 1970.

/s/ Josephine Hulsman
Notary Public for the City
and County of San Francisco,
State of California

My Commission Expires:

Department of the Army
Office of the Adjutant General
Washington, D. C.
20310

2 Mar 1970

AGPE-RP Parisi, Joseph
048 34 0713, US52726468 (24 Nov 69)

PFC Joseph Parisi, 048 34 0713
Hospital Company
U. S. Army Hospital
Fort Ord, California 93941

Dear Private Parisi:

I have been requested by the Army Board for Correction of Military Records to make further reply to your request for correction of your Army records.

The administrative procedures established by the Secretary of the Army for the guidance of the Army Board for Correction of Military Records provide that the Board may deny an application where a sufficient basis for a review has not been established.

Following examination and consideration of your Army records together with such facts as presented by you, the Army Board for Correction of Military Records on 11 February 1970 determined that insufficient evidence has

been presented to indicate probable material error or injustice. Accordingly, your application was denied.

In the absence of new and material evidence tending to show the existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Sincerely,

/s/ Kenneth G. Wickham
Major General, USA
The Adjutant General

CF
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Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-69 470 LHB

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON, etc., et al.

Respondents.

ORDER TO SHOW CAUSE

TO RESPONDENT STANLEY RESOR, Secretary of the Army:

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that you shall appear before this Court in the Courtroom of the Honorable Lloyd H. Burke, at the

Federal Building, 450 Golden Gate Avenue, San Francisco, California, on March 26, 1970, then and there to show cause, if any you have, why a Writ of Habeas Corpus should not be issued as prayed for in the Petition for Writ of Habeas Corpus filed herein, and

IT IS FURTHER ORDERED that you shall have to and including the 16th day of March, 1970, to have on file all affidavits and points and authorities on which you rely, and petitioner shall have to and including the 24th day of March, 1970, to file herein counter-affidavits and points and authorities in reply.

Dated: Mar. 6 1970

/s/ Lloyd H. Burke

United States District Judge

The requisite service of process

may be made by a private citizen as well as by a United States Marshal.

Dated: Mar. 6 1970

/s/ Lloyd H. Burke

United States District Judge

JAMES L. BROWNING, JR.
United States Attorney
STEVEN KAZAN
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: 556-6434
Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-69-470-LHB

JOSEPH PARISI,

Petitioner

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, etc., et al.

Respondents.

MOTION FOR STAY

Pursuant to this Court's Order of March 6, 1970, requiring respondents to appear and show cause why a writ of habeas corpus should not be issued, respondents herewith move the

Court to stay these proceedings pending petitioner's exhaustion of his available military judicial remedies.

On November 28, 1969 this Court denied petitioner's request for a preliminary injunction keeping him in the district. Then, on December 4, 1969 petitioner filed his Notice of Appeal in the Ninth Circuit, and moved ex parte before that court for a stay pending appeal. On December 10, 1969 that Court denied a stay on condition that respondents produce petitioner in this district if the appeal results in his favor.

On December 18, 1969 petitioner sought a stay from the Honorable William O. Douglas, Circuit Justice for the Ninth Circuit Court of Appeals. On

December 29, 1969, Mr. Justice Douglas denied the application for stay.

The petitioner was given orders in early December 1969 to report on December 31, 1969 for shipment to Vietnam.

Petitioner reported as directed on December 31, 1969, to the U. S. Army Personnel Center, Fort Lewis, Washington. At that point, he requested an opportunity to file a second application for discharge as a conscientious objector. As required by AR 635-20, he was given seven days to complete his application. But, on or about January 6, 1970, he advised the authorities at the Personnel Center that he no longer wished to make application. Accordingly, he was booked for shipment.

Petitioner then refused to

obey a lawful order to board the plane which was to take him to Vietnam. Accordingly, he has been charged with violating Article 90 of the Uniform Code of Military Justice, 10 U.S.C., Section 890, and has been confined in the Post Stockade, Fort Lewis, pending disposition of the charges against him. The offense with which he is charged is serious enough to warrant trial by General Court-Martial, and Article 32 Investigation, a necessary prerequisite to trial, has been completed. We understand that the trial is set for April 8, 1970.

For this Court now to consider the merits of petitioner's application for writ of habeas corpus would, under the state of facts which now exist, result in an unwarranted interference by the Court with the pending court-martial. Since petitioner has now subjected himself

to trial by court-martial, he should be required to exhaust his military judicial remedies. In re Kelly, 401 F.2d 211 (5th Cir. 1968); followed Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); compare Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967); aff'd 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1022 (1967); United States v. Augenblick, 393 U.S. 348 (1969); Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683, 693-699 (1969). Under recent military cases, the denial of petitioner's application may indeed be a defense to the charges against him; see United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). As the Ninth Circuit has observed in a similar context, ". . . it would seem intolerable to permit [petitioner] to run civil proceedings . . .

parallel to his criminal charge when he is on the eve of trial." McFadden v. Selective Service System, 415 F.2d 1140, 1141 (9th Cir. 1969).

Accordingly, the proceedings in this Court should be stayed pending the exhaustion of petitioner's military judicial remedies.

Dated: March 20, 1970.

JAMES L. BROWNING, JR.
United States Attorney

By /s/ Steven Kazan

Assistant United States Attorney

Attorneys for Respondents

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that a conformed copy of the foregoing Motion for Stay was mailed today to:

DOUGLAS M. SCHWAB, ESQ.
44 Montgomery Street, Suite 3000
San Francisco, California 94104

as attorney for petitioner in this cause.

Dated: March 20, 1970.

By: /s/ Steven Kazan
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B. Davidson, Etc., et al.,

Respondents.

ORDER STAYING PROCEEDINGS AND CERTIFYING FOR INTERLOCUTORY APPEAL

This matter came on regularly for hearing on March 26, 1970 pursuant to this court's order to show cause dated March 6, 1970, and pursuant to Respondents' motion for stay of proceedings pending exhaustion of military judicial remedies. Richard L. Goff and Douglas M. Schwab appeared as counsel for

petitioner; Steven Kazan, Assistant United States Attorney, appeared as counsel for respondents. After considering the documents and records on file in this action, and the oral arguments of counsel, and good cause appearing therefor,

1. IT IS HEREBY ORDERED that these proceedings are hereby stayed until there has been trial and a final judgment in the military courts on the court martial charges presently pending against petitioner. In re Kelly, 401 F.2d 211 (5th Cir. 1968); followed Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); compare Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967); aff'd 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1022 (1957); see United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). Cf. McFadden v. Selective Service System, 415 F.2d 1140, 1141 (9th Cir. 1969).

2. It is the opinion of this court that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion,*/ to wit:

> If a member of the Armed Services has filed in the Federal District Court a petition for a Writ of Habeas Corpus discharging him from the armed services on the ground of wrongful denial of his application for discharge as a conscientious objector, and if, while such proceedings are pending, he is charged by military authorities with refusing to obey a military order given to him after the filing of such Habeas Corpus petition, is it proper for the District Court to stay all further proceedings on the petition for the Writ of Habeas Corpus until the termination of court martial proceedings on the military charges against the petitioner?

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*/ See Gann v. Wilson, 289 F. Supp. 191, 193 (N.D. Cal. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968); Talford v. Seaman, 306 F. Supp. 941 (D.Md. 1969); Hammond v. Lenfest, 398 F.2d 705, 712-14 (2d Cir. 1968); Cooper v. Barker, 291 F. Supp. 952 (D.Md. 1968).

and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: March 31, 1970

/s/ Lloyd H. Burke
United States District Judge

Order approved as to form

/s/ Richard L. Goff
Attorney for Petitioner

Paragraph 2 of order approved as to form

Attorney for Respondents

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

25773
No. M-5016

JOSEPH PARISI,

Petitioner-Appellant,

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, etc., et al.

Respondent-Appellees.

ORDER

Before: DUNIWAY and ELY, Circuit Judges.

The petitioner's "Application for Leave to Take Interlocutory Appeal" is granted.

The documents attached to petitioner's application, in the absence of objection filed by the respondent-appellees on or before May 4, 1970, will be treated as the record on appeal.

The court denies petitioner-appellant's motion to treat his application and his reply brief in the District Court as his opening brief in this court. The petitioner-appellant will file his opening brief on or before May 11, 1970. The respondent-appellees will file their brief within fifteen days thereafter, and the petitioner-appellant may have five days from his attorney's receipt of respondent-appellees' brief within which to file a reply.

The Clerk is directed to set the cause for hearing, if possible, on the court's June 1970 calendar, preferably in San Francisco.

/s/ Walter Ely

United States Circuit Judge

DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY TRAINING CENTER, INFANTRY AND FORT LEWIS, FORT LEWIS, WASHINGTON 98433

2 July 1970

GENERAL COURT-MARTIAL ORDER
NUMBER 105

Before a general court-martial which assembled at Fort Lewis, Washington, pursuant to Corrected Court-Martial Convening Order Number 19, this headquarters, 6 January 1970, was arraigned and tried:

Private First Class Joseph Parisi, SSAN: 048 34 0713, U.S. Army, U.S. Army Overseas Replacement Station (attached Transient Company) U.S. Army Personnel Center, Fort Lewis, Washington.

Charge: Violation of the Uniform Code of Military Justice, Article 90.

Speficiation: In that Private First Class (E-3), Joseph Parisi, U. S. Army, U. S. Army Overseas Replacement Station (attached Transient Company), U. S. Army Personnel Center, having received a lawful command from Major Stanley M. Foscue, his superior commissioned officer, to board the aircraft, did, at McChord Air Force Base, Tacoma, Washington, on or about 2145 hours, 9 January 1970, willfully disobey the same.

PLEAS

As to the Specification and the

Charge: guilty.

FINDINGS

Of the Specification and the Charge: guilty.

SENTENCE BY MILITARY JUDGE

To be dishonorably discharged from the service, to forfeit all pay and allowances, to be confined at hard labor for two years, and to be reduced to the grade of Private E-1. (No previous convictions considered.)

The sentence was adjudged on 8 Apil 1970.

ACTION

DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY TRAINING CENTER, INFANTRY AND FORT LEWIS
Fort Lewis, Washington 98433

2 July 1970

In the foregoing case of Private First Class (E-3) Joseph Parisi, SSAN: 048 34 0713, U. S. Army, U. S. Army Overseas Replacement Station (attached Transient Company), U. S. Army Personnel Center, Fort Lewis, Washington, the sentence is approved. The forfeiture shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a Court of Military Review. Pending completion of appellate review the

accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as competent authority may direct.

/s/ Willard Pearson
/t/ WILLARD PEARSON
Major General, USA
Commanding

GCMO No. 105, HQ, USATC, Inf. & Ft Lewis, Ft Lewis, WA
dtd 2 Jul 70 (Cont)

BY COMMAND OF MAJOR GENERAL PEARSON:

OFFICIAL:

/s/ Charles L. Senn
CPT, JAGC
Act Asst AG

HARRY A. STELLA
Colonel, GS
Chief of Staff

DISTRIBUTION:
20-SJA, Ft Lewis, WA
1-Accused
1-COL Lee (MJ)
1-CPT Mavis (TC)
1-CPT Sullivan (DC)
2-CO, O/S Repl Sta, Ft Lewis, WA
2-CO, Pers Cen, Ft Lewis, WA
15-Cor Off, Post Stkd (for 201 file)
2-Cor Off, Post Stkd
4-Unit Pers Off
2-FAO, Ft Lewis, WA
2-G2, Ft Lewis, WA
1-Det A, 6th MP Gp (CI)
5-Comdt, USDB, Ft Leavenworth, KA 66027
1-CO, USA Pers Ser Sup Cen
ATTN: AGPE-F, Ft. Benj Harr, IN 46249
2-TPMG, DA, Washington, D.C. 20315
1-FCUSA, Indianapolis, IN 46249
1-CO, USAMPCIR, Ft Holabird, MD 21219
1-CG, Fifth Army

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 25773

JOSEPH PARISI,

Appellant,

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, etc., et al.,

Appellees.

Appeal from the United States District Court for the Northern District of California

Before: HAMLEY, ELY and CARTER, Circuit Judges.

ELY, Circuit Judge:

This is an interlocutory appeal, under 28 U.S.C. §1292(b), from an Order of the District Court, staying habeas corpus proceedings brought under 28 U.S.C. §2241 until trial and final determination of

court-martial charges then lodged against the appellant.

The complex history of the case is set out in detail in the margin.[1] Briefly, Parisi is an army private who alleges that his application for discharge as a conscientious objector was denied by the army without a basis in fact for the denial. His petition was first presented to the District Court in November, 1969, but proceedings were stayed pending his administrative appeal to the Army Board for Correction of Military Records [ABCMR].[2] A partial preliminary injunction also issued, prohibiting Parisi's assignment to any duties which required materially greater participation in combat activity or training than was being required of him in his then duties.

Before the ABCMR's decision, however, Parisi was ordered to Viet Nam, where he was to perform noncombatant duties similar to those which had been assigned

to him and which he had been performing in this country. After unsuccessful attempts to win a stay of his redeployment order both from our court and from the Circuit Justice, Parisi chose, with all attendant risks, to disobey a military order to enplane for Viet Nam. Charges were then immediately filed against him, under U.C.M.J. art. 90, for failure to obey a lawful order.

Prior to the date set for court-martial, the ABCMR notified Parisi that it had ruled against his appeal. The District Court promptly ordered the Government to show cause why a writ should not then issue. In its return, the Government requested the stay Order in question, on the grounds that to permit concurrent federal court proceedings would constitute an unwarranted interference with the military court system.

The question is not an easy one,

but we have concluded that habeas proceedings were properly stayed pending the final conclusion of Parisi's military trial and his appeals therefrom.

The military, no less an agency of the federal government than the federal court system, has the equal responsibility to act consistently with the Constitution and laws of the United States. 3/ While civilian courts are available to correct, in a proper case, abuses by military authorities, 4/ they must be careful to avoid unwarranted interference with internal military matters.

> "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Orloff v. Willoughby, 345 U.S. 83, 93-94, 97 L. Ed. 842, 73 S. Ct. 534 (1953). Thus, there is the general rule that:

> "[H]abeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain."

Noyd v. Bond, 395 U.S. 683, 693, 22 L.Ed. 2d 631, 89 S. Ct. 1876 (1969).[5/]

Parisi does not argue the wisdom and correctness of the exhaustion of administrative remedies doctrine as applied to military proceedings. He strenuously contends, however, that the doctrine was improperly applied in the court below.

First, Parisi argues that the doctrine applies only to administrative, not judicial remedies. The risk of imprisonment and dishonorable discharge inherent in military judicial proceedings, he claims, renders it unfair to require one first to assert his claims as defenses

at a military trial before being able, successfully, to initiate habeas proceedings in a federal civilian court.

In support of this argument, Parisi relies, primarily, upon Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968). There, it appears that the district judge expressly rejected Government contentions that a claim of wrongful detention in the military by an inservice conscientious objector must first be raised as a defense to court-martial, noting that

> "[i]f [the Government's] contentions were to prevail, the only way one in petitioner's position could raise his constitutional claims of wrongful detention would be by first committing a crime and facing the possibility of imprisonment."

284 F. Supp. at 253.

However, assuming, arguendo, the correctness of Crane, the case is distinguishable. Crane was a sailor who deserted his ship after his application for conscientious

objector discharge was administratively denied, but before formal charges were brought against him in military court. We note the reasoning, on similar facts, [6] of Judge Kaufman in Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968):

> "[A]lthough the government maintains that Hammond should present his claim as a defense to a court martial, it fails to explain wherein lies his power to convene the court martial that is supposedly to judge him. And, as Professor Jaffe posits, where '[o]ne must at his risk await such further enforcing procedure as the agency chooses to initiate *** the exhaustion doctrine is inapplicable; the person has no remedy.' Jaffee, The Exhaustion of Administrative Remedies, 12 Buff. L. Rev. 327, 329 (1963)"

398 F.2d at 714.

This reasoning is inapposite to Parisi's case, for when the District Court issued the Order here challenged, charges had then already been filed against Parisi by the military authorities,

the tribunal that was to judge him had already been convened, and the trial itself was imminent. Parisi was not under the burden of being required to commit a further military "crime" in order to provide himself with a forum. He had already done the act alleged to be unlawful. Thus, we cannot see that either Crane or Hammond supports Parisi's argument.[7/]

In Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968), an inservice conscientious objector was granted habeas relief during the pendency of his Article 90 courtmartial for failure to obey orders which were given after administrative denial of his application for conscientious objector discharge. But Gann relied solely on Crane and Hammond, supra, and we think that such reliance was misplaced.[8/]

Here, the District Court relied upon

In re Kelly, 401 F.2d 211 (5th Cir. 1968), wherein the Fifth Circuit upheld a stay order on facts very similar to those before us.[9] Parisi's attempts to distinguish Kelly, arguing that there, habeas was invoked after formal court-martial charges were lodged, whereas he sought habeas before he committed the disobedience leading to the military charges against him.[10] However, Parisi's November, 1969 petition was prematurely filed under our rule in Craycroft v. Farrell, 408 F.2d 587 (9th Cir. 1968), vacated and remanded, 397 U.S. 335 (1970). When the ABCMR ruled in March, 1970, satisfying the administrative exhaustion requirement, Parisi renewed his petition, as was proper, but he, at that time, was already facing court-martial. Thus, he is in the

same position as was Kelly in the Fifth Circuit.

We are not blind to the possible moral dilemma that Parisi faced. We cannot quarrel with the proposition that disobedience based on the dictates of religious conscience is based on "an obligation, superior to that due the state, of not participating in way in any form." United States v. Seeger, 380 U.S. 163, 172, 13 L.Ed. 2d 733, 85 S. Ct. 850 (1965). However, the District Court's injunction was reasonable and afforded ample protection for Parisi's religious scruples. Three judges of our court and our Circuit Justice found that the military order for Parisi's redeployment did not, in the circumstances, violate the District Court's protective order. While Parisi may honestly have disagreed, that disagreement cannot be held to have justified his unilateral determination to defy

his military superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise similar discretion, necessary military discipline would collapse. Had Parisi bided his time, it appears, on the record before us now, that he likely would have obtained the relief he sought from the District Court. If the fruits of his impatience are bitter, he has only himself to blame for production.

A serviceman facing court-martial should not be permitted habeas relief in a federal court during the pendency of his military trial and appeals therefrom, except, perhaps, when it might appear that no military tribunal to which he has recourse is capable of granting an appropriate remedy.

If possible anticipation of this qualified conclusion, Parisi argues that

the relief he sought in the District Court is in fact elsewhere unavailable. This argument is based on two grounds. First, Parisi asserts that denial of an application for conscientious objector discharge without a basis in fact is not recognized as a defense to an Article 90 court-martial. Second, he argues that even if his claim were a good defense, and established to the satisfaction of the military court, the only remedy he could there expect would be acquittal, not the honorable discharge that might be ordered by a District Court.

Were this true, we would hesitate to subject Parisi to the rigors of a fruitless series of appeals; however, we are not convinced that he is correct in his interpretation of the existing state of military law.

Parisi supports the first of the arguments now under discussion only by

his interpretation of certain of the rulings of the military judge at his court-martial.[11] It appears to us, however, that if error in the military court is indicated, it is not that the military judge refused to review the merits of Parisi's conscientious objector claim, but that he may have adopted an improperly narrow standard for review thereof. This is surely an appropriate point to present to the military's appellate tribunals, and we are referred to no case from the Court of Military Appeals, the highest military court, indicating that an appropriate constitutional standard will not be required.[12]

Parisi is also unable to support his contention that the military appellate tribunals are unable to grant him a discharge no matter what his defense is. We are not now

prepared to assume that, if it is determined that Parisi's application for discharge was denied without basis in fact, an error of such constitutional magnitude cannot be rectified by a reviewing court within the military system.[13] If it should eventually come to pass that the military courts will not apply those constitutional principles which must control their decisions, as well as ours, Parisi may then bring that fact to the attention of the District Court.

Affirmed.

United States Circuit Judges

Footnote 1/

Joseph Parisi was drafted on August 22, 1968. According to the in-service conscientious objector application he filed with the Army on May 22, 1969 (pursuant to Army Regulation (AR) 635-20), Parisi had doubts at the time of his induction about his feelings toward military service. However, his beliefs did not coalesce into conscientious objection until he was well down the road of basic training and initial duty assignment (Psychological social work and counseling). His application, which was made prior to issuance of any order for redeployment to a combat station, also stated that his Army experiences to that point led him to the firm conviction that participation in any form of military activity conflicted irreconcilably with his

Christian beliefs.

The initial interviews mandated by AR 635-20 uniformly terminated in Parisi's favor; the base Chaplain, the base psychiatrist, and the special hearing officer (as well as Parisi's immediate supervisor) all attested to the sincerity and religious nature of Parisi's conscientious objection to military service. According to the record, the Commander of the Army hospital at Parisi's base as well as the Commanding General of his training center also recommended approval of the application, although they did not interview Parisi personally. However, Parisi's immediate commanding officer, Captain Hubman, recommended disapproval, with the notation, "Consider application contrary to paragraph 3b(3) AR 635-20." This paragraph provides that conscientious

objector applications will not be favorably considered when:

> "(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code."

Captain Hubman had not interviewed Parisi nor had he engaged in any conversations with Parisi about the latter's religious beliefs and convictions.

In November, 1969, the Department of the Army denied Parisi's application. That office noted two reasons for its decision: (1) that Parisi's professed beliefs became fixed prior to entering the service, and (2) that Parisi was not truly opposed to all war due to his religious beliefs, as demonstrated by his attempts thus far to support it.

Parisi then applied to the Army Board for Correction of Military Records (ABCMR) for review of the denial of his

discharge. Shortly thereafter, on November 28, 1969, he applied to the United States District Court for the Northern District of California for a writ of habeas corpus. He therein sought discharge from the Army as a conscientious objector.

In his habeas petition Parisi claimed that there was no basis in fact for the grounds cited by the Department of the Army in denying his application for a discharge. In addition, Parisi sought a preliminary injunction pending disposition of the proceeding to prevent respondents from: (1) requiring him to obey an order of August 8, 1969, to undergo training preparatory to being transferred to Viet Nam for duty; and (2) transferring him outside the jurisdiction of the District Court

where the proceeding was commenced.

On the day the petition was filed, the District Court, after a hearing, entered an Order enjoining respondents from assigning Parisi to any duties which required materially greater participation in combat activity or training than was being required of him in his then present duties. This Order was to remain in effect pending decision by the ABCMR on Parisi's application to it for discharge as a conscientious objector.

The district court order recites that the court would retain jurisdiction of the case until the ABCMR made its decision. The Order also denied Parisi's application for a preliminary injunction against his transfer out of the Northern District of California. On December 4, 1969, Parisi took an interlocutory appeal (No. 25,133 in this

court) from the Order denying his requested preliminary injunction.

About this time, Parisi received orders to process out of his then duty station at Fort Ord, California, and, following training, to report to the Overseas Replacement Station at Oakland, California, on December 31, 1969. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Parisi then moved in this court for an order staying his deployment outside the Northern District of California pending disposition of his appeal.

Three other judges of our court denied the motion on December 10, 1969, "on condition that Respondents produce Appellant in this district if the appeal results in his favor." On December 29, 1969, the Circuit Justice denied a similar application for a stay.

Parisi reported, on December 31,

1969, as directed, to the United States Army Personnel Center, Fort Lewis, Washington. At that time he requested an opportunity to file a second application for discharge as a conscientious objector. As required by AR 635-20, he was given seven days to complete his application. However, on January 6, 1970, Parisi advised the authorities at the Personnel Center that he no longer wished to make out an application. Accordingly, he was booked for transportation overseas.

Parisi then refused to obey a military order to board a plane for Viet Nam. He was immediately charged with violating Article 90 of the Uniform Code of Military Justice, 10 U.S.C. §890, and was confined to the Post Stockade, pending disposition of the charge against him.

On March 2, 1970, while Parisi's court-martial was pending, the ABCMR notified Parisi of its rejection of his application for relief from the Army's denial of his discharge request. Four days later the District Court, pursuant to Parisi's habeas petition, entered an Order requiring respondents (appellees in this appeal) to show cause why a writ should not be issued. The United States responded by moving in the District Court for a stay of the habeas proceedings pending exhaustion of Parisi's military judicial remedies.

At this point Parisi suggested to a panel of judges of our court that the first interlocutory appeal he had taken from his habeas proceeding (No. 25,133 in this court, above) should be dismissed as moot. As noted, the ABCMR had by this time denied him relief, and, since he was incarcerated

at Fort Lewis, there was no remaining need for an injunction to keep him in this country. We entered the requested Order, dismissing the first appeal, on March 17, 1970.

On March 31, 1970, responding to the Government's motion that it abstain pending completion of Parisi's court-martial proceedings, the District Court entered an Order staying its consideration of Parisi's habeas petition until there was a trial and a final judgment in the military courts on the court-martial charges.

The District Court did not stay the court-martial proceedings pending our consideration of the interlocutory appeal, nor have we done so; consequently, in the interim between the date of the district court order, March 31, 1970, and the date of our

acceptance of the appeal, April 24, 1970, Parisi was, on April 8, 1970, court-martialed and convicted of the charge against him. He is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a stenence of two years at hard labor, with dishonorable discharge. We have been advised that his appeal before the Court of Military Review is now pending.

Footnote 2/ (Reference page 1)

This is the exhaustion requirement deemed controlling in Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970). See also Bratcher v. McNamara, 415 F.2d 760 (9th Cir. 1969); Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969).

In Craycroft's appeal before the Supreme Court, the Solicitor General conceded that the administrative remedies which our court had required to be exhausted were either unavailing or had already been exhausted. 397 U.S. at 335.

Footnote 3/ (Reference page 2)

Craycroft v. Ferrall, 408 F.2d 587, 595 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970).

Footnote 4/ (Reference page 2)

See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

Footnote 5/ (Reference page 3)

This rule was established by Gusik v. Schilder, 340 U.S. 128 (1950). There, Mr. Justice Douglas, speaking for a unanimous Court, more precisely expressed the rationale for this result:

> "An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a

> state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere . . . . The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved . . . . Such a principle of judicial administration is in no sence a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile."

Id. at 131-32. The deference thus deemed appropriate is not demanded by our court's jurisdictional limitations, but by sound considerations of comity. Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); In re Kelly, 401 F.2d 211 (5th Cir. 1968). So, in an appropriate case, habeas may be entertained without strict adherence to the exhaustion

requirement. In re Kelly, supra.

We have apparently not dealt with the precise exhaustion question raised by this appeal. We declined to consider the issue in Craycroft v. Ferrall, 408 F.2d 587, 589 n.1 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970). There we

> " . . . distinguish[ed] our analysis of the exhaustion [of administrative remedies] problem from cases in which, once military administrative remedies have been exhausted, in-service conscientious objectors were allowed to seek civil relief before enduring court-martial proceedings and exhausting possible appeals therefrom."

Id. at 589 n.1 (citations omitted).

Last term the Supreme Court also declined to resolve the question whether inservice conscientious objectors who have exhausted administrative remedies must also undergo court-martial proceedings before seeking habeas relief, although it noted that the

Circuits have divided on the issue. Noyd v. Bond, 395 U.S. 683, 685 n.1 (1969) (citing cases).

Footnote 6/ (Reference page 4)

Hammond's application for discharge from the Navy on conscientious objector grounds had been denied before habeas was sought, but no military charges were then pending against him.

Footnote 7/ (Reference page 4)

The distinction drawn herein was implicitly recognized in Hammond, where the Second Circuit distinguished Gusik on the grounds that Gusik "had already been courtmartialled and the Court simply concluded that once that route had been traversed, it was incumbent upon him to exhaust his appeal . . ." 398 F.2d at 713.

Footnote 8/ (Reference page 5)

Parisi also relies on Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969) and Cooper v. Barker, 291 F. Supp. 952

(D. Md. 1968). These cases, however, present no new considerations.

Footnote 9/ (Reference page 5)

Kelly was an inservice conscientious objector court-martialed for wilful disobedience of a superior officer. He brought habeas proceedings during the pendency of his court-martial.

Footnote 10/ (Reference page 5)

Parisi also asserts that Kelly rested, in part, on the court's conclusion that there was little chance of Kelly's success on the merits of his petition in the District Court.

Footnote 11/ (Reference page 6)

"Well, I do not read Noyd the way you do as requiring that I make a decision and a determination of the basis in fact other than to examine the entire file and the entire record, and in my view determine

whether or not the ruling of the Secretary of the Army was arbitrary, capricious, unreasonable, or an abusive [abuse of?] discretion. Now, that may be saying in different words that I am ruling on the basis in fact. I'm not sure about that. But I do not consider that to be -- and I want the record to so reflect, so that you may have an opportunity to get a definite ruling on it -- that I am not ruling solely as a basis of fact. I am ruling that I have examined this document. I have studied it. I find it conforms to AR 635-20. There has been no deprivation of administrative due process and I find from the examination of this record that the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive

[abuse of?] discretion."

Footnote 12/ (Reference page 7)

In fact, Parisi himself argued at his court-martial that United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 S.S.L.R. 3218 (1969) had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of the lawfulness of the order alleged to have been disobeyed. United States v. Wilson, 2 S.S.L.R. 3548 (U.S.C.M.A. 1969) is not contrary. There, the accused had refused an order to put on his uniform, was court-martialed, and the following instruction was given by the law officer: " . . . Personal scruples or qualms, whether based upon religious convictions, personal philosophy, or otherwise, are no defense to the offense of wilful disobedience of the

order as alleged . . . ."

In upholding this instruction, the Court of Military Appeals remarked:

> "As Noyd indicated, the freedom to think and believe does not excuse intentional conduct that violates a lawful command . . . If the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience."

2 S.S.L.R. at 3548. However, Noyd seems to make it clear that a defendant's religious convictions are admissible on the issue of the lawfulness of the order allegedly disobeyed. If he were erroneously denied discharge as a conscientious objector, some type of subsequent orders, obviously conflicting with his religious convictions, could be unlawful:

> "Colonel Hansen testified he gave the accused the order to fly as an F-100 instructor only after he had been informed the application for separation [as a conscientious objector] had been denied. The

> validity of the order, therefore, depended on the validity of the Secretary's decision . . . . If the Secretary's decision was illegal, the order it generated was also illegal."

United States v. Noyd, supra at 3221.

Thus, Wilson merely stands for the proposition that an inservice conscientious objector must obey "lawful" orders, not all orders. See also United States v. Dunn, 38 C.M.R. 917 (1968); United States v. Taylor, 37 C.M.R. 547 (1966).

In this connection, we think the legality of any such subsequent military order could not be determined without consideration of its nature, in scope and magnitude. Obviously, an inservice objector, remaining in the service pending the review of the denial of his claim for discharge should not be permitted to defy, for example, an order to report for muster and drill or an order to maintain himself and his

quarters cleanly and neatly. Here, again, we note that the District Court had protected Parisi against exposure to violence. Cf. Kemble v. Commandant, 12th Naval Dist., ___F.2d ___ (9th Cir. Feb. 25, 1970).

Footnote 13/ (Reference page 7)

The All Writs Act, 28 U.S.C. §1651(a), has been held to permit a military court to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction." United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). The military court's power to issue emergency writs of habeas corpus is well-settled. Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 25773

JOSEPH PARISI,

Appellant,

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, etc., et al.

Appellees.

JUDGMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It

is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY

JUN 2 1971

ATTEST
WM. B. LUCK, CLERK
By R. D. Hewitt
Deputy

Filed and entered Dec. 3, 1970

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 3, 1971

E. ROBERT SEAVER
Clerk of the Court

Douglas M. Schwab, Esq.
44 Montgomery Street
Suite 3000
San Francisco, California 94104

RE: PARISI v. DAVIDSON
No. 1413, O.T. 1970

Dear Mr. Schwab:

The Court today took the following action in the above case:

"The motion to dispense with printing the petition and the petition for a writ of certiorari are granted. The motion to advance oral argument is denied."

Enclosed is a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
by /s/ Helen K. Loughram
(Mrs.) Helen K. Loughram
Assistant Clerk

AIR MAIL
Enclosures